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Municipal Wastewater Treatment Works
Construction Grants Program
Program Requirements Memoranda

(U.S.) Environmental Protection Agency
Washington, DC

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EPA

Program Requirements Memoranda

Municipal Wastewater Treatment Works Construction Grants Program

MCD-02.10

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WASHINGTON, D.C. 20460

NOTICE TO ALL HOLDERS OF THE EPA
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Because the material contained in the "Manual of References" is obsolete, further printing and distribution will cease. However, the program policy documents incorporated in that manual, and subsequently updated by the publication of supplemental issuances of new and revised Program Requirements Memoranda (PRMs), will continue to be made available to that segment of the public involved in various aspects of the Construction Grants Program. Hence, holders of the MCD-02 will continue to receive copies of Program Requirements Memoranda (MCD-02.00) as they are printed. So that PRM recipients are kept apprised of the completeness of their policy document library, a full index of PRMs issued will be included with each printing.

Municipal Wastewater Treatment Works
Construction Grants Program

PROGRAM REQUIREMENTS MEMORANDA

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 30 1980

Construction Grants
Program Requirements Memorandum
PRM #80-3

SUBJECT: Management Reforms to Reduce the Time Interval Between Step 3 Grant Award and Initiation of Construction (Property Acquisition, Local Share Funding, Service Agreements and Cultural Resource Investigations)

FROM: Henry L. Longest II, Deputy Assistant Administrator for Water Program Operations (WH-546)

TO: Regional Administrators (I-X)
ATTN: Water Division Directors

INTRODUCTION

We have identified a number of problem areas within the construction grants program which are causing delays in the preconstruction phase of Step 3 projects. This memorandum is being issued to implement management reforms that will minimize many of these delays.

This memorandum sets forth agency policy in the following four areas:

1. Acquisition of real property (including easements).
2. Local funding requirements.
3. Service agreements.
4. Cultural resource investigations.

The appropriate provisions and procedures contained in this Program Requirements Memorandum will be incorporated into any proposed revision to construction grant regulations.

SECTION A - ACQUISITION OF REAL PROPERTY (INCLUDING EASEMENTS)

PURPOSE

The purpose of this section of the memorandum is to clarify agency policy regarding the time frame within the grant process for the acquisition of real property, including the taking of easements.

DISCUSSION

Current Environmental Protection Agency (EPA) regulation 40 CFR 35.920-3(b)(2) requires, as part of a Step 2 grant application, "Adequate information regarding availability of proposed site(s), if relevant." PRM 77-6 expands on this point and requires the grantee to perform preliminary easement related work concurrent with other Step 2 work. PRM 77-6 also requires the regional office to consider the need (on a case-by-case basis) for the grantees to undertake the actual taking of easements and/or acquisition of sites during the Step 2 process. EPA regulation 40 CFR 35.935-3(b)(3) requires the grantee to obtain all property rights before the initiation of Step 3 construction. At the present time, there is no EPA policy that clearly describes the action that must be completed prior to Step 3 grant award. Consequently, initiation of construction is delayed on many Step 3 projects until the grantee has obtained the required property rights. This policy statement is intended to establish procedures that would minimize this delay.

POLICY

It is EPA policy that all real property (including easements) be obtained, or bonafide options taken, or formal condemnation proceedings initiated, prior to Step 3 grant award, unless the action is prohibited by State or other Federal Agency requirements.

The term "bonafide option" refers to an irrevocable commitment on the part of the landowner to transfer to the grantee an interest in land at a specified price. Such options should provide for an expiration date, normally at least one year, and must be supported by adequate consideration and include any other applicable requirements necessary to make the option enforceable under State and local law.

IMPLEMENTATION

Effective October 1, 1980, no Step 3 grant is to be awarded until the grantee has submitted assurances that all required property rights as defined in 40 CFR 35.935-3(b) have been obtained, or bonafide options taken, or formal condemnation proceedings initiated, except for those situations noted below. This assurance can be in the form of a certification or other documentation established by the Regional Administrator.

The assurance requirement would exclude the acquisition of land to be used for sludge disposal or land treatment, as the costs of such acquisitions are eligible for Federal participation under a Step 3 grant, but would become unallowable if incurred prior to Step 3 grant award (see PRM's 75-25, 75-39, 77-5, 78-4 and 40 CFR 35.940-3). However, amendments to construction grant regulations published July 5, 1979, authorize the Regional Administrator to use his discretion in permitting grantees to proceed with the acquisition of eligible land after approval of

the facilities plan in advance of the normal Step 3 award either by (1) award of a Step 3 segment consisting only of purchase of eligible land, 40 CFR 35.920-3(c)(2) or (2) approval of the grantee's preaward cost for the purchase of eligible land, 40 CFR 35.925-18(b). In the case of a Step 3 grant awarded solely for the acquisition of eligible land, compliance with the requirements for approved user charge/industrial cost recovery systems, operations and maintenance manuals and sewer use ordinances are deferred until the award of the ensuing Step 3 assistance for the construction of the facilities, 40 CFR 35.930-1(a)(1). All grantees are encouraged to make maximum use of the advance acquisition provisions. In addition, the regional offices or delegated State agencies, should recommend the use of the advance acquisitions provisions in situations where the implementation of the procedures would accelerate the initiation of construction. However, the review/approval provisions contained in PRM 79-7 must be completed prior to the purchase of grant eligible land for projects where treatment more stringent than secondary is anticipated.

In addition, the assurance requirement would exclude the acquiring or taking of property rights, or bonafide options, or initiating formal condemnation proceedings, if the action is prohibited by State or other Federal Agency requirements. However, the grantee must complete all site acquisition work required for the Step 3 grant that is not prohibited by State or other Federal Agency requirements.

In the situation where the acquisition of property rights, or bonafide options, or initiation of formal condemnation proceedings, prior to Step 3 grant award, is prohibited by EPA, State, or other Federal Agency requirements, the grantee should submit the following information for each property site excluded from the assurance requirement:

1. The appropriate designation (parcel number, reference code, etc) for the property site.

2. The State or Federal requirement that prohibits the acquisition of property rights, or bonafide options, or initiation of formal condemnation proceedings, prior to Step 3 grant award.

3. Future actions required to obtain the property or property rights, and a schedule for these actions.

4. Assurance that all site acquisition work not prohibited by State or Federal requirements has been completed.

Allowable project costs incurred in the implementation of the procedures contained in this policy statement, e.g., costs incurred under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, should be included in the Step 2 grant. If necessary, the Step 2 grant should be amended to include these costs.

REFERENCES

40 CFR 35.920-3(b)(2)
40 CFR 35.920-3(c)(2)
40 CFR 35.925-18(b)
40 CFR 35.930-1(a)(1)
40 CFR 35.935-3
40 CFR 35.945(g)
40 CFR Part 4

PRM 79-7, "Grant Funding of Projects Requiring Treatment More Stringent than Secondary," March 9, 1979.

This policy statement supercedes PRM 77-6 issued May 4, 1977. PRM 77-6 is hereby cancelled.

SECTION B - LOCAL FUNDING REQUIREMENTS

PURPOSE

The purpose of this section of the memorandum is to establish Agency policy to assure that the applicant has reasonable access to funds required to finance the non-EPA share of the Step 3 project costs.

DISCUSSION

EPA requirements concerning the grantee's ability to finance the non-EPA share of the construction costs is contained in 40 CFR 35.925-5, 35.935-1(c) and the assurance statement requirements of the "U.S. Environmental Protection Agency Application for Federal Assistance (Construction Grants)." In Part V of the application, the grantee assures and certifies that it will have sufficient funds available to meet the non-EPA share of the cost for construction projects. In Part III, Section D, of the grant application, the applicant describes the proposed method for financing the non-EPA share of the project. At the present time there is no EPA requirement for the grantee to initiate financial arrangements prior to Step 3 grant award. Consequently, many Step 3 projects are delayed while the grantee is obtaining the necessary funds. This policy statement is intended to establish procedures to minimize this inherent delay.

POLICY

It is EPA policy that the grantee conduct preliminary financial planning including structuring of the financing during the Step 1 phase of the project. As much of the financial arrangements as possible shall be performed during the Step 2 phase of the project. At the time of Step 3 grant award, the financial arrangements shall have progressed to the stage that the grantee can obtain the funds required to finance the non-EPA share of construction cost within 90 days.

The Regional Administrator can authorize additional time to complete the necessary financial arrangements in situations where the State or other Federal agencies impose requirements such that the non-EPA share cannot be obtained within 90 days of Step 3 grant award. The authorization and the amount of additional time authorized should be included in the grant agreement.

IMPLEMENTATION

Effective October 1, 1980, no Step 3 grant is to be awarded until the applicant has given assurances that he can obtain the funds necessary to finance the non-EPA share of the project within 90 days of grant award. This assurance can be in the form of a certification or other documentation established by the Regional Administrator. However, the grantee should exclude from the certification requirement sources of funds that cannot be obtained within 90 days of Step 3 grant award because of conflicting State or other Federal Agency requirements.

Effective October 1, 1980, every application for a Step 3 grant must include the following information for each separate source of funds required to finance the non-EPA share of Step 3 cost:

1. The source of the funds.

2. The amount of the funds.

3. The financial arrangements completed to date.

4. Future actions required to obtain the funds, and a schedule for these actions.

For every source of funds excluded from the assurance requirement the grantee should list:

1. Items 1-4 above.

2. The applicable State or Federal requirement that prohibits obtaining these funds within 90 days of Step 3 grant award.

REFERENCES

EPA Form 5700-32 (Rev. 8-77)
40 CFR 35.925-5
40 CFR 35.935-1(c)

SECTION C - SERVICE AGREEMENTS

PURPOSE

The purpose of this section of the memorandum is to clarify EPA regulations regarding the timing for the execution of service agreements between the grantee and subscribers of the grantee, including major Federal facilities.

DISCUSSION

The Environmental Protection Agency (EPA) regulations published September 27, 1978, include a requirement for the submission of all intermunicipal agreements with a Step 2 application. Specifically, 40 CFR 35.920-3(b)(6) states that "Before the award of a grant or grant amendment for a Step 2 project, the grantee must furnish ... Proposed or executed (as determined appropriate by the Regional Administrator) intermunicipal agreements necessary for the construction and operation of the proposed treatment works, for any treatment works serving two or more municipalities." EPA regulation 40 CFR 35.920-3(c)(1) states that "final intermunicipal agreements must be furnished" with the Step 3 grant applications.

The term "executed" was used in the regulation governing Step 2 grant applications and the term "final" was used in the regulation governing Step 3 grant applications. The use of two slightly different terms to describe the same action could result in a minor misunderstanding of the regulations. In addition, the regulations do not specify the timing for the execution of service agreements between the grantee and major Federal facilities. The intention of this policy statement is to establish the time frame within the grant process when service agreements must be executed and to define EPA requirements to include service agreements between the grantee and major Federal facilities.

POLICY

It is EPA policy that the terms "final" and "executed" as used in 40 CFR 35.920-3(b)(6) and 40 CFR 35.920-3(c)(1) describe the same action and can be used interchangeably.

It is EPA policy that all agreements necessary for the construction and operation of a proposed treatment works serving a municipality and one or more major Federal facilities must be executed prior to Step 3 grant award.

IMPLEMENTATION

This policy is effective October 1, 1980.

REFERENCES

40 CFR 35.920-3(b)(6)
40 CFR 35.920-3(c)(1)
40 CFR 35.925-16
PRM 75-35, Issued December 29, 1975, with attachment issued February 20, 1976.
Memorandum on "Federal Facility Funding" dated December 18, 1978, from John T. Rhett to Regional Administrators (I-X).

TECHNICAL REPORT DATA
(Please read Instructions on the reverse before completing)

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15. SUPPLEMENTARY NOTES	

16. ABSTRACT

This handbook contains the replacement pages and policy directive after the Manaul of References (MCD-02) was published. This represents the tenth in a series of Program Requirements Memoranda.

for the construction of sewage treatment plants.

17. KEY WORDS AND DOCUMENT ANALYSIS

a. DESCRIPTORS	b. IDENTIFIERS/OPEN ENDED TERMS	c. COSATI Field/Group
Water Pollution Control	Manual of References Updating	

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SECTION D - CULTURAL RESOURCE INVESTIGATIONS

PURPOSE

The purpose of this section of the memorandum is to clarify agency policy regarding the time frame within the grant process for the completion of investigations required to identify cultural resources affected by EPA construction grant projects.

DISCUSSION

EPA regulations 40 CFR Part 6, Subpart C, 40 CFR 6.507 and the construction grants "Handbook of Procedures" state that cultural resource investigations must be integrated with the environmental review and performed during the facility planning process, however, there is currently no requirement that specifies the time frame within the grant process for the completion of these cultural resource investigations. Consequently, some investigations are not being performed in a timely fashion and portions of the work are still underway during the Step 3 phase of the project. This policy statement is intended to eliminate this delay.

POLICY

All investigations required by 40 CFR Part 6, Subpart C and 40 CFR 6.507 should be initiated during the Step 1 phase of the project and be completed prior to Step 3 grant award. However, nothing in this policy statement precludes the funding of cultural resources investigations performed during the Step 3 process, if the need for an investigation or follow-up work is not identified until that time.

IMPLEMENTATION

This policy is effective October 1, 1980.

REFERENCES

PRM 75-27 issued July 2, 1975.
40 CFR Part 6.

EXEMPTIONS

It is not the intent of this PRM to burden the grantee with unnecessary or restrictive requirements. The purpose of the PRM is to minimize the delay in the preconstruction phase of a Step 3 project. However, it is possible, especially during the initial implementation phase of this new policy, that a provision of the PRM could place an undue hardship on a grantee. If this is the case, an exemption to the requirement that is causing the problem will be considered.

All requests for exemptions should be submitted to:

Harold P. Cahill, Jr., Director
Municipal Construction Division WH-547
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

The exemption should contain, as a minimum:

(1) The name of the grantee and the grant identification number.

(2) Identification of the section of the PRM from which an exemption is sought.

(3) An adequate description of the need for an exemption including any pertinent background information which will contribute to an understanding of the problem, including any extenuating circumstances.

(4) A recommendation from the regional office.

ADDITIONAL REFERENCES

A. 40 CFR 35.935-9, Project Completion.
B. Memorandum to Regional Administrators from John T. Rhett, "Construction Grants Projects Not Yet Under Construction," November 5, 1976.
C. Memorandum to Water Division Directors from John T. Rhett, "Preconstruction Status Report," May 25, 1977.
D. POM 77-12, "Management of Preconstruction Phase of Step 3 Grants," June 21, 1977.
E. PRM 78-12, "Preconstruction Lag Management," June 12, 1978.
F. Memorandum to Regional Administrators from John T. Rhett, "Step 3 Projects Not Under Construction," December 8, 1978.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL 1540-2]

Women's Business Enterprise Policy for the Construction Grants Program; Final Program Requirements Memorandum

AGENCY: The Environmental Protection Agency.

ACTION: Final Program Requirements Memorandum.

SUMMARY: This Program Requirements Memorandum (PRM) is to establish a Women's Business Enterprise (WBE) policy for the Environmental Protection Agency's (EPA) Construction Grants Program. The purpose of the final policy is to increase participation of women-owned businesses in the construction of wastewater treatment works funded by EPA.

DATES: Effective date: October 1, 1980.

ADDRESSES: Comments will be accepted on a continuing basis, and any comments received will be considered in reviewing program implementation. Comments may be sent to:

Women's Business Enterprise Officer, U.S. Environmental Protection Agency, Office of Small and Disadvantaged Business Utilization, 401 M Street S.W., Washington, D.C. 20460, or to the Office of Civil Rights and Urban Affairs in each Region.

SUPPLEMENTARY INFORMATION: The Program Requirements Memorandum (PRM) set forth below is part of EPA's implementation of the requirements of Executive Order 12138 (May 18, 1979; see 44 FR 29637, May 22, 1979) and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1251 note). The PRM will apply to EPA grantees and their consultants and contractors under the program of assistance for construction of wastewater treatment works authorized by Section 201 of the Clean Water Act (33 U.S.C. 1281).

EPA has developed Women's Business Enterprise (WBE) policies for its direct contracting activities, and these are being implemented separately. EPA also intends to address utilization of WBE under grants other than grants for construction of wastewater treatment works.

The first draft of the PRM was circulated for comment to all EPA regional offices and to interested organizations, businesses, state and local agencies, and individuals. Based on comments received, the draft was revised and published as a proposed PRM at 45 FR 26934 (April 21, 1980). Public meetings were held in Washington, D.C., Chicago, Illinois, and Seattle, Washington, on April 25, May 13, and May 14, respectively, for comment on the proposed PRM. In addition, EPA representatives visited a number of localities throughout the country in order to increase public participation in the development of the PRM. Written comments were received through June 30, 1980.

During April, May, and June, 1980, EPA conducted a survey in order to assess the number of women's businesses available to participate in projects under EPA's Construction Grants Program. The survey results served as one basis for EPA's conclusion that a goal-oriented policy for women-owned business participation is appropriate. This study also provided information to be used in developing a source list of WBEs.

The public meetings, comments, and survey addressed a number of aspects of the PRM and the manner of its implementation. Some commentors objected to the PRM on the general ground that these additional requirements are burdensome and interfere with the primary purpose of the Construction Grants Program, that is, treatment of municipal wastewater. The need for such a policy was determined by the Interagency Task Force on Women Business Owners and reflected in Executive Order 12138. The results of EPA's survey and the comments of WBEs, women's organizations, and several state agencies further indicate that such a policy is appropriate. EPA has made every effort to implement Executive Order 12138 as consistently as possible with established industry practice and in the least burdensome manner possible.

Fully two-thirds of the written comments, as well as the majority of comments at the public meetings, addressed the need for a goal. These comments ranged from those stating that WBEs are too few to warrant any goal to those stating that a 20 or 25 percent goal should be established. Often commentors recommended goals reflecting their perception of WBE availability in their geographic area. EPA has considered these comments in light of the survey results. Although those results revealed a greater number of women-owned businesses with apparent capability to participate in the Construction Grants Program than originally anticipated, and there is increasing evidence of women entering the architectural, engineering, construction and related areas, EPA has concluded that a national goal of two percent (2%) of total contract dollars to be awarded under EPA Construction Grants is appropriate. EPA recognizes, however, that a higher goal may better reflect available WBEs in some areas, and a lower goal may be appropriate in other areas. Furthermore, since WBE participation is to be calculated as the amount of contract dollars to WBEs of total prime contract dollars awarded, the size and nature of projects are significant factors in determining a realistic goal. For these reasons, EPA has concluded that the Regional Administrators in each Region must set a regional goal which may be equal to or higher than the national goal. The Region may also designate a goal for each project, which may be equal to, higher than, or lower than the regional goal, depending upon the factors outlined above. The goal will apply to prime construction contracts of $500,000 and over and to all prime contracts for architectural, engineering, and related services of $10,000 and over.

Several local and state agencies as well as businesses requested that the responsibilities of EPA, the grantee, and bidders/offerors be clarified. The PRM has been revised to eliminate this confusion. Primary responsibility for ensuring that the policy requirements are met rests with the grantee. Although EPA will monitor compliance, the grantee remains the primary implementor of the PRM. This responsibility will be included in the grant agreement as a grant condition. However, the primary implementation responsibility of the grantee does not diminish the obligation of bidders/offerors to make positive efforts to utilize women-owned businesses.

Part of the grantee's obligation is to disseminate information regarding available women-owned businesses. In order to facilitate information collection and distribution, EPA will compile a source list to be maintained on a computer in Headquarters and to be available to the Regions and the public. EPA will continue updating and maintaining such a list until this service is assumed by another, more appropriate, agent or until deemed by EPA as being relatively unnecessary. This list will not represent the exclusive source of WBE information, however, nor will its use exhaust the obligations of grantees, or consultants and contractors under the PRM.

One additional area receiving substantial comment is that of certification of WBEs. EPA shares the concern of commentors that only *bona fide* women-owned businesses benefit from the policy. After considering the

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variety of recommendations for assessing WBE authenticity, EPA determined that WBEs will be deemed *bona fide* based on self-certification unless challenged and found unqualified under the criteria in the PRM. A challenge to a WBE's authenticity may serve as grounds for protest pursuant to EPA procedures at 40 CFR 35.939. It should be noted that EPA's source list does not serve as EPA certification of the authenticity or competency of WBEs. The grantee will have primary responsibility to implement the PRM by refusing to give credit towards the goal for those firms failing to establish their WBE qualifications.

Several women and trade organizations noted the need for training opportunities for women-owned businesses. EPA is continuing to explore avenues of training opportunities currently provided by other federal agencies and private organizations. Training is but one area of special need brought to EPA's attention. Problems concerning insurance, bonding, discriminatory building codes, and financing are also noted and are receiving attention by EPA and other federal agencies.

EPA has revised the PRM with respect to implementation of the definition of "women-owned business." Because of the difficulty in applying the requirement that 51 percent of the business be women-owned in states with community property laws, those laws will not be taken into consideration for purposes of determining ownership under this PRM. If taken into consideration, community property laws could have the effect of disqualifying otherwise qualified WBEs while technically qualifying businesses that are at least 51 percent owned by men. For these reasons, the effect of these laws will not be considered under this PRM.

Commentors again suggested that the WBE policy be administered in conjunction with EPA's Minority Business Enterprise (MBE) Policy. Some commentors preferred a single goal for WBE and MBE participation rather than establishment of separate goals. There are a number of similarities between the policies and, when possible, they will be administered together. Our goal is to issue by December 1, 1980, additional guidance in order to combine, to the extent possible, procedures to implement the WBE and MBE policies. Questions such as the time to require submission of documentation of positive efforts, level of information required, method of calculating WBE participation, and others, will be addressed at that time. In view of need to implement the WBE and MBE procedures simultaneously, applicability of the policies and requirements of this PRM shall apply to all projects for which assistance is awarded after January 31, 1981. EPA will not combine the WBE and MBE goals, however. The purposes of the two policies are distinct. In order to provide maximum opportunities to the beneficiaries of these policies, credit for minority women-owned businesses must apply toward one goal or the other. The PRM provides that contractors and consultants may apply part of a minority WBE's contract dollars to MBE and part to WBE for the purposes of calculating MBE and WBE participation.

In the publication of the proposed PRM, the possible transfer of oversight responsibilities for WBE and MBE to the Office of Small and Disadvantaged Business Utilization (OSDBU) was mentioned. This reorganization within EPA will take place prior to the October 1, 1980, effective date of the PRM. All references to the Headquarters Office of Civil Rights (OCR) in the proposed PRM have therefore been changed to OSDBU in the final document.

The effective date of the PRM is October 1, 1980. However, in recognition of the need to allow sufficient lead time for proper implementation and to avoid problems of retroactivity, the policies and requirements of this PRM shall apply to all projects for which assistance is awarded after January 31, 1981.

Dated: July 18, 1980.

Barbara Blum,

Deputy Administrator.

Construction Grants Program Requirements Memorandum PRM #80-4

July 17, 1980.

To: Regional Administrators, Attn: Office of Civil Rights and Urban Affairs and Water Division Directors.

From: Barbara Blum, Deputy Administrator.

Eckardt C. Beck II, Assistant Administrator for Water and Waste Management.

Subject: Implementation of Women's Business Enterprise Support Program.

Purpose: To Establish Policies Related To Use of Women-Owned Businesses.

Discussion: Executive Order 12138, issued May 18, 1979, requires EPA to establish a program of appropriate affirmative action in support of Women's Business Enterprise (WBE) and to prohibit actions or policies which discriminate against women-owned businesses on the basis of sex. Section 13 of the Federal Water Pollution Control Amendments of 1972 (33 U.S.C. § 1251 note) prohibits discrimination on the basis of sex in the distribution of benefits under or in the participation in any program or activity receiving funding under the Federal Water Pollution Control Act.

Policy: The policy of EPA is to encourage increased participation by women-owned businesses in all subagreements under EPA grants for construction of wastewater treatment works. This policy implements Executive Order 12138 and Section 13 of the Federal Water Pollution Control Act Amendments of 1972. The policy is intended to provide opportunities for immediate participation of women-owned firms in work performed under the Construction Grants Program, and to encourage the development and participation of new women-owned firms. Compliance with this policy, and the requirements under "implementation" below, shall be a condition of all EPA grants for construction of wastewater treatment works, within the limits of the "applicability" provision below.

Implementation

A. *Applicability.* The policies and requirements of this PRM shall be applicable to all projects for which assistance is awarded after January 31, 1981. Nothing in this PRM precludes a grantee, contractor, or consultant from voluntarily implementing these or similar policies for prior projects, and EPA encourages such action.

B. *What Constitutes a Women-Owned Business.* The term "women-owned business," and its variations, means a business which is at least 51 percent owned by a woman or women who also control and operate it. 1. Ownership. Determination of whether a business is at least 51 percent owned by a woman or women shall be made without regard to community property laws. For example, an otherwise qualified WBE which is 51 percent owned by a married woman in a community property state will not be disqualified because her husband has a 50 percent interest in her share. Similarly, a business which is 51 percent owned by a married man and 49 percent owned by an unmarried woman will not become a qualified WBE by virtue of his wife's 50 percent interest in his share of the business.

2. Control and operation. "Control" means exercising the power to make policy decisions, and "operate" means being actively involved in day-to-day management.

3. These are some of the factors to be considered in determining whether the requisite ownership and control exist: a. The percentage of stock owned in a

corporation or the proportion of capital invested in a partnership.

b. Whether ownership is meaningful (e.g., whether the woman's ownership interest is such that the woman owner can sell the business or liquidate at will, or whether the woman owner's interest is subject to a controlling lien on her interest).

c. The provisions for sharing income and losses.

d. Whether there is evidence that the woman owner participates significantly in business policy development and decisions of importance to the business (e.g., whether there are procedures requiring her "sign-off" on significant actions; or whether there is evidence of substantial change in actions in response to her comments).

e. Whether corporate history indicates that the business is, in fact, woman controlled (e.g., female ownership prior to competition for a contract under this policy would be a factor tending to support validity; on the other hand, further inquiry might be appropriate if changes in ownership had occurred within a few weeks or months prior to competition, if a change in ownership involved related persons, or if the change involved the same parties in interest: i.e., a former female minority stockholder in a family business who suddenly becomes a majority stockholder).

4. Self-certification. a. Women-owned businesses shall furnish capability statements and certification of qualification as WBEs to the grantee.

b. EPA and its grantees reserve the right to review the representation (including the right to require other evidence satisfactory to the grantee or EPA).

c. Firms which are not *bona fide* women-owned and controlled are not entitled to benefit from the opportunities under this policy. Those found not to meet the definition are subject to sanctions, which include a finding of nonresponsibility and, in willful cases, criminal prosecution under 18 U.S.C. § 1001.

5. Credit under this policy shall be granted for WBEs performing a useful business function according to custom and practice of the industry. No credit will accrue for a WBE acting merely as a passive conduit of funds to some other, non-WBE, entity, where such activity is unnecessary to accomplish the project.

C. *Goals for Use of Women-Owned Firms.* 1. National Goals. EPA has established a national goal of two percent (2 percent) of total prime contract dollars awarded.

2. Regional Goals. Each Region shall establish a regional goal equal to or higher than the national goal. Each Region shall establish regional goals no later than February 1, 1981. These goals shall be based on the best available information about current and potential availability of women-owned businesses. Until regional goals are established, the national goal shall be the applicable goal for the region. The Region shall reassess the goals at least annually.

3. Project Goals. The Region may establish a goal higher or lower than the regional goal for individual projects, depending upon availability of WBEs and the nature of the project.

4. Application of Goal. All prime construction contracts of $500,000 or more and all prime contracts for architectural, engineering, and related services of $10,000 or more shall be subject to the application of the goal.

5. Method of Calculating WBE Participation. The percentage of contract dollars awarded to women-owned businesses of total contract dollars (as defined in paragraph C.4.) awarded under a grant shall represent the level of WBE participation.

D. *EPA Responsibilities.*

1. Headquarters Responsibilities. a. The Women's Business Enterprise Officer in OSDBU with the assistance of the Office of Water Program Operations will compile and maintain a source list of WBEs. This source list will be available to the Regions for distribution to grantees, consultants, contractors, and bidders/offerors. The source list will not serve as EPA certification or recognition of the authenticity or competency of any WBE listed. The purpose of the source list is to serve as one, but not the exclusive, resource for locating WBEs.

b. The Women's Business Enterprise Officer will provide assistance and direction in support of the policy in this memorandum, and, within the limits of available resources, will coordinate an outreach program to identify and inform women-owned businesses which are potential participants in the Construction Grants Program.

2. Regional Responsibilities. a. Each Regional Administrator shall ensure that EPA regional responsibilities under this memorandum are met. Each Regional Administrator will make an effort to ensure that a broad range of WBEs in a variety of disciplines will be used to meet the goals. Each Regional Administrator is authorized to establish and publish other criteria for determining what constitutes a WBE firm, if the requirements of local business practices or state laws in a region justify further means of ensuring that the objectives of Executive Order 12138 are met.

b. Each Regional Administrator shall establish a regional goal, with the assistance of the Director of the Office of Civil Rights and Urban Affairs (OCRUA) and the Water Division Director and with the advice of Regional Counsel. The Region in consultation with the grantee may establish project goals. In establishing goals, the Region shall consider views of women-owned businesses, women's organizations, reresentatives of construction and engineering firms, technical and professional organizations, women's banks, affected public agencies, and the public.

c. Promptly after establishing its regional goal in accordance with paragraph C.2. each Region shall distribute a statement of its goals and this policy to the affected States, grantees, all potential grantees (i.e., those in the fundable portion of the State's project priority list), women-owned firms on the source lists grantees have developed under paragraph E., and other appropriate organizations and individuals. This distribution shall be repeated at regular intervals and whenever goals change.

d. In administering this PRM, each Region shall ensure that grantees and their consultants and contractors do not "double count" minority women for purposes of the WBE and MBE goals. The prime contractors and consultants may choose the goal towards which the minority WBE will apply. It will be acceptable for the contractors and consultants to divide the total credit between the WBE and MBE goals. For example, where a minority WBE will perform six percent of the work, the credit may be distributed in a number of ways, including:

1. 6% to WBE, 0% to MBE; or

2. 0% to WBE, 6% to MBE; or

3. divided, for example 3% to WBE, 3% to MBE.

e. Each Region shall review solicitation inserts to ensure that this policy is adequately reflected in all solicitations for contracts and other subagreements under grants. OCRUA may assist in the review of solicitation documents.

f. Each Region shall establish a process of review and monitoring to ensure that grantees and their consultants and contractors make positive efforts to use women-owned businesses.

g. Each Region shall maintain records on awards of contracts to WBE firms, to be submitted quarterly to Headquarters Office of Water Program Operations,

which in turn will apprise OSDBU of regional performance.

h. Each Region shall assist the Women's Business Enterprise Officer in OSDBU in developing source lists of WBE firms, in cooperation with grantees, States, and interested persons and organizations.

E. *Grantee Responsibilities.* The grantee has primary responsibility for taking positive actions to ensure maximum feasible participation by women-owned firms in Steps 1, 2, 3 and 2+3 projects. At a minimum, these positive efforts shall include the following: 1. Each grantee shall include the project goal in each procurement solicitation.

2. Each grantee must ensure that procurement documents contain the following information: a. Clear notice of the applicable goal, including a number or range of numbers, and the obligations of the bidder/offeror under the policy.

b. The method by which positive efforts of the bidder or offeror will be evaluated.

c. A notice of federal and grantee sanctions for failure to comply with the positive efforts in the solicitation documents.

d. A copy of this policy.

3. Each grantee shall cooperate with the State and appropriate Regional Office in developing and updating a source list of women-owned businesses which might be interested in seeking a consultancy, contract, or other subagreement under the EPA-assisted project.

4. Each grantee shall provide a source list of women-owned firms to all prospective consultants and contractors, and inform them of EPA policy on use of women-owned businesses.

5. Each grantee shall ensure that notification of prospective procurement actions is provided to women-owned firms in sufficient time to respond. This responsibility includes ensuring that the grantee's contractors, consultants, and subcontractors, in their respective procurement action, notify women-owned firms in a timely fashion.

6. Each grantee shall verify that women-owned businesses designated by bidders or offerors are available to participate in the project. This verification will occur as part of the determination of a bidder or offeror responsibility.

7. Each grantee is encouraged to provide liaison services between WBEs and prospective bidders/offerors.

Note.—Reasonable costs of WBE liaison services, as determined by the EPA Project Officer, are allowable costs (liaison services are the services of a grantee, staff person or other entity which helps the grantee conduct responsibilities related to this policy).

F. *Responsibilities of Consulting Firms and Contractors.* All consulting firms and contractors of the grantee, including WBE firms, are expected to make good faith positive efforts to identify and use women-owned businesses, in accordance with the policy, goals, and requirements of this memorandum. Appropriate positive efforts should begin during negotiation or bid preparation and continue throughout the life of the contract. Such efforts shall include, but not be limited to, the following: 1. Extending opportunities to women-owned businesses for subcontracting, joint ventures, and provision of equipment, supplies, and services.

2. Notifying women-owned businesses on a source list obtained from the grantee, and other women-owned businesses known to the contractor or consultant, of goals and opportunities to compete for or do business with the contractor or consultant within sufficient time to respond. Use of EPA's source list does not, in and of itself, satisfy the requirements to use positive efforts.

3. Providing the grantee with adequate documentation of positive efforts, including nature and dollar amount of work to be performed by WBEs, and, if the goal will not be met according to the estimates currently available, documentation showing WBEs contacted, WBE responses, and reasons for non-selection of WBEs.

4. Maintaining records, to be available to the grantee and EPA, of the efforts under paragraphs 1., 2., and 3., and of awards to women-owned firms.

5. Making positive efforts to compensate for any changes in plans to award subcontracts to women-owned firms, and informing the grantee and EPA of such actions.

6. Meeting the requirements of paragraph (J) below.

G. *What Women-Owned Firms Should Do.* Women-owned businesses should become knowledgeable about and involved in the State and local project planning process under the Construction Grants Program. Women-owned firms should provide statements as to the nature and scope of their business and capability statements to the Women's Business Enterprise Officer in OSDBU for inclusion on the source list, as well as to the EPA Regional OCRUA, appropriate State and local government agencies, and contractors and consultants doing business in the Construction Grants Program. WBEs should make efforts to establish contracts and rapport with businesses recognized as potential contractors and consultants.

H. *Sanctions.* 1. Responsibility Determination. In the event a bidder or offeror fails to objectively demonstrate positive efforts the grantee shall request, in writing, that the bidder or offeror provide evidence of positive efforts within 15 days of the request, or be held nonresponsible. The Regional Administrator may instruct the grantee to request such documentation after the Region reviews bid documents submitted by the grantee or any other available information. If the bidder or offeror fails to comply adequately with the request, the grantee shall determine this bidder or offeror to be nonresponsible, and shall so advise the bidder or offeror promptly in writing with an explanation of the basis for the determination. A finding of nonresponsibility on a contract shall not prejudice the right of that bidder or offeror to submit bids or proposals on other EPA-funded projects. However, in determining responsibility, the grantee will consider any evidence it has concerning performance in relation to WBE obligations and goals under other contracts.

2. Protests. a. If the bidder or offeror disagrees with this determination of nonresponsibility under paragraph H.1. the bidder or offeror may then file a protest under 40 CFR § 35.939.

b. A disappointed bidder, offeror or listed WBE may also file a protest under 40 CFR § 35.939 to challenge a determination that the apparent low bidder or offeror fulfilled the positive efforts requirements of this PRM.

3. Exceptions. Nothwithstanding paragraph 1., the grantee may award a contract (with the approval of the Regional Administrator) where the bidder or offeror did not demonstrate positive efforts, if (a) delay incident to resolicitation would cause substantial harm to the grantee, and (b) the contract (i) requires specific positive efforts for compliance with this policy (including goals) during contract performance, and (ii) includes appropriate sanctions for failure to perform in accordance with the contract. (e.g., termination or liquidated damages).

4. Grantee's failure. If a grantee fails to meet its obligations under paragraph 1. above, or fails to meet any other requirement in this memorandum, EPA may declare the grantee nonresponsible under 40 CFR § 30.340, or deny, modify, suspend, or terminate assistance in accordance with 40 CFR Part 30, Subpart H.

I. *Grantee's Higher Goals.* Nothing in this policy prevents a grantee from

setting higher goals for use of women-owned firms on work under EPA grants.

J. *Contractors' and Consultants' Responsibilities After Award.* If requested, contractors and consultants shall submit to the grantee copies of, or information concerning, awards to women-owned firms, and lists of WBE firms contacted and used. From time to time (but not more often than quarterly), the contractor or consultant will be expected to comply with requests from the grantee for information on the status of compliance with the policy and requirements in this memorandum. In the event a consultant or contractor fails to conform to its obligations under this memorandum, the grantee will require corrective efforts or, as appropriate, modify, suspend or terminate the contract or subagreement.

K. *Reexamination of Policy.* 1. Review of the national goal will take place annually.

2. By October 1, 1983, the Administrator will examine this policy and its implementation and may modify the policy as is appropriate.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 9 1980

OFFICE OF WATER
AND WASTE MANAGEMENT

Construction Grants
Interim Program Requirements Memorandum
PRM No. 80-5

SUBJECT: Buy American

FROM: Henry L. Longest, II, Deputy Assistant Administrator
for Water Program Operations (WH 546)

TO: Regional Administrator
Regions I - X

I. PURPOSE

This PRM sets forth interim Agency policy and procedures concerning the application of the Buy American provision of the Clean Water Act of 1977 and the final regulations governing the Construction Grants Program for municipal wastewater treatment works published in the Federal Register of September 27, 1978 (Part III). PRM 78-3 concerning the same subject is superceded, as well as the temporary guidance document of January 9, 1979. This interim PRM was developed because numerous requests were received from the public for further clarification of the application of the Buy American provision. This interim PRM is also being published in the Federal Register with a 90-day period provided for comments and suggestions. Issues which have come to the attention of EPA are addressed. If there are others, EPA would appreciate being informed of them, with suggested resolution.

II. DISCUSSION

Section 39 of the Clean Water Act of 1977 added a new section 215 to the Federal Water Pollution Control Act. This new section requires that only manufactured and unmanufactured materials and supplies that have been mined, produced or manufactured in the United States, and are substantially all From United States' sources, shall be used in treatment works for which grant assistance is provided by EPA. This is known as the Buy American provision and it applies to any Step 3 grant for which application is made after February 1, 1978.

In the legislative history of the provision, Congress directed that the Buy American regulations of other Federal departments and agencies be followed, where applicable. These other regulations are generally incorporated in the federal procurement regulations in the Code of Federal Regulations which are generally based on the Buy American Act of 1933 (42 U.S.C.A. 10a-d) and an Executive Order of 1933, with subsequent updates, which interpreted several aspects of the Act. (See Executive Order 10582, December 17, 1954, as amended by Executive Order No. 11051, September 27, 1962.).

EPA issued its own final provision for Buy American in the Construction Grants regulations by adding a new paragraph (d) to 35.936-13 (Specifications) which requires that bidding documents and construction contracts for affected projects include a Buy American provision which requires use of domestic construction material, substantially all from United States' sources, in preference to foreign construction material. The regulations also establish those circumstances under which the Agency may waive the provision. Domestic construction material must be given preference if the domestic material is priced no more than 6 percent higher than the bid or offered price of foreign materials (including import duties). The application of the Buy American provision normally occurs after bids or price quotations have been received.

Appendix C-2 to Subpart E was also amended by adding a new Clause 17 which implements the Buy American provision in construction contracts.

III. POLICY

In contracting for wastewater treatment works being assisted by the EPA municipal wastewater treatment Construction Grants Program, a price preference of up to 6 percent is required to be given to construction materials that have total component costs of over 50 percent in value from domestic sources, when such materials are in price competition with construction materials that have component costs of 50 percent or more in value from nondomestic sources (subject to waiver from the Regional Administrator, where appropriate).

IV. IMPLEMENTATION

1. The Three-Procedure Buy American Process

In implementing the Clean Water Act Buy American provision, there are three major procedures that take place:

First Procedure: Determination of the "construction material" to which the Buy American provision applies.

Second Procedure: Application of the "manufactured in United States" and "50 perecent rule" to the construction materials so as to classify as domestic or nondomestic material.

Third Procedure: Application by the prime construction contractor of the 6 percent price preference for domestic materials to the bids or price quotations where domestic and nondomestic construction materials are in competition.

These procedures are discussed below and are also set forth in an overall chart at the end of this Interim PRM. Because of the complexities in applying the Buy American Act of 1933 and subsequent Executive Orders, regulations, guidances and decisions, it is suggested that the following description of the Buy American procedures be read in conjunction with the simplifying chart.

First Procedure: Determination of the Construction Material to Which the Buy American Provision Applies

EPA regulations and the Federal Procurement Regulations refer to "construction materials" as subject to the Buy American provision. The regulations define construction material as any article, material or supply brought to the construction site for incorporation into the treatment works. Construction materials are sometimes referred to as "end products." Installation and other services to be performed after delivery are normally excluded. The Buy American provision does not apply to material which a contractor utilizes for construction but which the project specifications do not require to be incorporated into the treatment works. Examples include protective covers for building materials or building forms used in construction, whether or not left in the ground.

In practice, construction materials are those items that are referred to as separate distinct items or unit processes in the specifications for the project. Normally, for example, there will be only a limited number of separate items of equipment that are listed in the specifications for both technical and bidding purposes, such as a filter press, incinerator, aerator equipment, large pump, etc. These are the types of equipment "end products" to which the Buy American provision is applied. The grantee will normally be best able to decide upon the appropriate classification of items. If there are problems, the grantee may seek assistance from the EPA Regional Office which may consult EPA Headquarters. The State Agency should be notified by the grantee that this assistance is being requested.

Construction materials are of two types--manufactured or unmanufactured--and are of either domestic or nondomestic origin. Construction materials may be made up of "components." A component

is any article, material or supply which is directly incorporated into a construction material. The 6 percent price preference, as described in the Third Procedure, is applied to construction materials and not components.

Unmanufactured Construction Materials

An unmanufactured construction material is a raw material that is mined or grown. A unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. It should be relatively easy to identify raw materials and their national origins. A raw material could be, for example, gravel that in the case of municipalities on international boundaries could come from either the United States or an adjacent foreign country. If the domestic gravel is in price competition with nondomestic gravel, the domestic gravel will receive a 6 percent price preference as explained later. If the gravel is incorporated into concrete which is delivered to the site, then it is a component of a manufactured construction material.

Manufactured Construction Materials

Manufactured construction materials, as applied to sewage treatment facilities construction, refer to material such as pipe for sewers, reinforcing steel or structural steel for erecting buildings, and equipment that is necessary for the project. These items will usually be listed in the project specifications in separate sections. In the case of equipment, construction materials could include such items as incinerators, aerators, filter presses, large pumps, etc., as separate, distinct items or unit processes. Usually equipment that is identified as a construction material will be that which will usually be supplied by one supplier or manufacturer, is included within one section of the specifications, and is treated at the construction site as a separate item of equipment.

Accordingly, an integrated equipment package that is normally supplied by a single supplier as a trade practice could be considered as one item of equipment if included as such in specifications. Also, equipment that is listed in the specifications as a separate, distinct item will usually be treated as a single product even though delivered to the construction site in a number of separate components to be assembled and incorporated into the treatment works.

The identification of a piece of equipment as a manufactured material or a component of a manufactured material will sometimes vary depending upon the particular situation. The same generator, for example, may be a separate identifiable construction material in one instance, and a component of a larger item, such as an incinerator, in another instance. The particular circumstances have to be

considered, but the item that is identified within a separate section of the specifications and is treated at the construction site as a distinct, complete item will normally determine that to which the Buy American provision is to be applied.

A sewage treatment plant, as an entity, would normally not be considered the end product.

Second Procedure: Application of the "Manufactured in United States" Requirement and the 50 percent Rule to Construction Materials

In the case of manufactured construction materials, the statute and regulations create a preference for construction materials "manufactured in the United States" that are "substantially all" from materials, articles or supplies of domestic origin. Construction materials that meet this test are known as "domestic," those that do not are "nondomestic."

Federal procurement regulations specify that to be "domestic," a manufactured construction material must meet two tests: (1) it must have been manufactured in the United States, and in addition, (2) the cost of its components which are mined, produced, or manufactured in the United States must exceed 50 percent of the cost of all its components (termed "substantially all") from domestic sources. If a construction material does not meet both of these two tests, it is considered to be "nondomestic." Explanatory comments on these two tests follow:

(1) Manufactured in the United States

The Buy American provision requires that to be domestic, construction materials must be manufactured in the United States (includes all jurisdictions defined as a "State" in Section 502(3) of the Clean Water Act, 33 USC 1362(3)). A construction material will not be considered domestic if it is manufactured entirely outside the United States from domestic components. The "manufactured in the U.S." test is applied very broadly. For example, the Comptroller General has ruled that the mounting of electric motors on an otherwise inoperable imported pump unit constituted "manufacture" of the unit. However, the Comptroller General has also ruled that the mere packaging of an item is not manufacturing, nor are testing and evaluation of items considered manufacturing.

The determination as to whether or not an item is manufactured in the United States is not expected to be very difficult in the ordinary run of cases. If there are problems, they will be resolved by the grantee or the EPA Regional Office, with appropriate assistance from EPA Headquarters.

(2) The "Substantially All" (50 Percent) Test

Once the "manufactured in the United States" test has been satisfied, a manufactured construction material must satisfy the "substantially all" (50 percent) test. The rules for applying this test have been established by the Comptroller General (46 Comp. Gen. 784).

This test provides that a manufactured construction material is classified as domestic if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all of its components. A component is an item which actually becomes part of the construction material. Manufacturing costs to assemble the components into the final product are not considered in applying the 50 percent rule. For purposes of determining the ratio of domestic component cost to total component cost, items such as packaging, shipping, labor and other production costs, testing and profit, are not considered (as these are not components).

An example with an explanation of the application of the 50 percent rule follows:

Shipping Labor Testing Profit Other Production Costs			$12,000	Final manufacturing costs not considered in 50 percent
Component A Foreign	Component B Domestic	Component C Domestic	Component D Domestic*	Basis of 50 percent cost determination
$20,000	$4,000	$6,000	$8,000	

* - Component made by equipment manufacture itself (priced as though it were purchased from another manufacturer or supplier)

In this illustration, there are four components that make up the composition of a piece of equipment. Foreign component "A" costs the manufacturer $20,000. Components "B" and "C" are purchased from domestic manufacturers and total $10,000 together. Component "D" is manufactured by the manufacturer itself and has a value, as though it were purchased like the other domestic components, of $8,000. The value assessed should be at the component rather than spare parts level. To compute the 50 percent rule, the value of the domestic components ($18,000) is compared to the value of the total of all of the components ($20,000 + $4,000 + $6,000 + $8,000 = $38,000). As the total value of all of the components is $38,000, and the value of the domestic components ($18,000) constitutes 47.5 percent of the total value, the equipment is determined to be nondomestic as the domestic value is not over 50 percent of the total value. Note that the $12,000 in final manufacturing costs is not permitted to enter into the computation. It is only the value of the components that is considered (based on the 1967 GAO decision). Also note that the 6 percent cost preference rule is not applied during this evaluation (by GAO decision) as it is used by the prime contractor only in the evaluation of price quotations from suppliers or manufacturers.

The 50 percent test does not require the contractor, subcontractor or other lower tier supplier who might supply construction materials to consider the national origin of the materials that have been used in the manufacture of the components which make up the construction material to be delivered. To have the cost of a component be regarded as "domestic" for purposes of the 50 percent test, it need only be established that the component was mined, produced or manufactured in the United States. In other words, the 50 percent test is not applied to the composition of each component; rather, the component is considered only as to where it was mined, produced, or manufactured. 45 Comp. Gen. 658 (1966).

Third Procedure: Application of the 6 Percent Price Preference for Domestic Construction Materials to Bids or Price Quotations

When domestic and nondomestic materials are in competition, the prime construction contractor, as well as subcontractors, are required to apply the Buy American provision to give preference to domestic construction materials when the domestic material has a delivered price of no more than 6 percent over the nondomestic material.

The differential by which domestic construction material may be given preference shall generally be the sum determined by computing up to 6 percent of the bid or offered price of materials of foreign origin including all costs of delivery to the construction site,

including any applicable duty, whether or not assessed. Computations will normally be based on prices on the date of opening of bids or the date of price quotations.

The contractor applies the Buy American provision at the time that the identity of the material and its prices become known. For example, the identity and the delivered price of a construction material may be able to be determined at the time of bid submittal. At other times it may be when shop drawings are submitted. If the original selection is changed or a change order involves construction materials, then the contractor will have to reapply the Buy American requirements.

If the prime contractor does not properly comply with the Buy American provision by providing a nondomestic material when a domestic material should have been chosen, it may be required to substitute the domestic material at no change in price. If the material has been irrecoverably incorporated into the treatment works, then the grantee may assess the contractor for the difference in the costs of the domestic and nondomestic materials that were in competition.

It should be noted here that a manufacturer or supplier of a domestic material must have made a bid or price quotation on the project at the appropriate time for doing so. A manufacturer or supplier cannot, after the fact, unilaterally secure use of its domestic material by stating that it will supply it for a price within the 6 percent variation.

V. WAIVERS

In accordance with the EPA Buy American statute, the Regional Administrator may waive the Buy American provision based on those factors deemed relevant, including:

(1) Inconsistency with the public interest, including multilateral government procurement agreements.

(2) Unreasonable cost of the domestic material.

(3) Unavailability of the material from domestic sources in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(4) Unavailability of Agency resources to carry out the provisions.

These four provisions are summarized as follows:

(1) Inconsistency with Public Interest, Including Multilateral Government Procurement Agreements

The public interest waiver has traditionally been included in Buy American regulations to cover unforeseen circumstances. For example, it has been held that the determination that domestic sources will be unable to satisfy the needs for material in a timely manner will suffice as a basis for this waiver. In addition, the Congress in December 1977 included the possibility of a waiver for inconsistency with multilateral government procurement agreements. This provision was included in the context of the multilateral trade agreement which the White House was negotiating with other nations to remove obstacles to world trade. The legislative history of the Trade Agreements Act of 1979 specifically states that the Buy American provisions in the Clean Water Act will not be affected by the Trade Agreements Act. Therefore, no waivers will be made in connection with that Act.

The Regional Administrator may make the public interest determination, but the Deputy Administrator must be consulted on any waiver based on the multilateral government procurement agreement clause.

(2) Unreasonable Cost of the Domestic Material

The cost of domestic material is considered to be unreasonable when the delivered price of a domestic material exceeds the delivered price of a nondomestic material by more than 6 percent. Under these circumstances, the waiver is automatic, and no application for a waiver needs to be made to the Regional Administrator.

(3) Unavailability of Domestic Materials

Where a construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities or satisfactory quality for the particular project, a nondomestic source may be used. A component that is domestically unavailable will be treated as a component manufactured in the United States.

(4) Unavailability of Agency Resources to Implement the Buy American Provision

The Congress provided EPA with the authority to waive the implementation of the Buy American provision if EPA resources are not sufficient to carry out the provision. The Regional Administrator, with the concurrence of the Deputy Administrator, may exercise this authority. (The use of this waiver would be a policy decision of some magnitude and is expected to be used only in extraordinary circumstances.)

In answer to several comments, consideration was given to establishing a floor of $10,000 below which Buy American would be waived but this was not found to be possible. Comments are, however, requested on the concept of a floor.

VI. REQUIRED STATEMENT IN BIDDING DOCUMENTS

EPA regulations (40 CFR 35.936-13(d)(4)) provide Buy American provisions that must be included in the bidding documents (along with the rest of 40 CFR 35.936, 35.938, and 35.939).

VII. REQUIRED STATEMENT IN STEP 3 CONTRACTS

Appendix C-2 of the Construction Grants Regulations provides the Buy American provision for all construction contracts.

VIII. ACCESS TO RECORDS

A supplier or manufacturer is obligated to disclose upon request, cost and price information to the Regional Administrator to the extent necessary to determine compliance with the Buy American requirement: However, confidential business data will be protected from public disclosure by the Regional Administrator.

IX. PROTESTS

Any party with an adversely-affected direct financial interest may protest an alleged violation of the Buy American provision in accordance with 40 CFR 35.939 of the regulations for grants for construction of treatment works.

The Regional Administrator may handle protests under the appropriate procedures of 40 CFR 35.939. In making determinations, the Regional Administrator shall generally use the "Buy American" procedures, regulations, precedents and requirements of other Federal departments and agencies.

BUY AMERICAN PROCEDURES

FIRST PROCEDURE	SECOND PROCEDURE	THIRD PROCEDURE
Identification of construction material to which to apply Buy American.	Application of 50% rule to determine if construction material is domestic or nondomestic (usually done by manufacturer).	Application of 6% price preference for domestic construction materials. (Prime Contractor)
DEFINITION OF CONSTRUCTION MATERIAL		
Any article, material or supply brought to the construction site for incorporation into the treatment works. Construction materials are either manufactured or unmanufactured..		
MANUFACTURED CONSTRUCTION MATERIAL	**MANUFACTURED CONSTRUCTION MATERIAL**	**MANUFACTURED CONSTRUCTION MATERIAL**
Specifications will normally identify manufactured "end products" that are to be delivered to construction site; e.g., steel beams.	First Test: If construction material is manufactured in foreign country, it is nondomestic. Second Test: If construction material is manufactured in the U.S., add up costs to manufacturer of all "components." Exclude profit, labor & other production costs to manufacture the components into construction material. If over 50% of total costs of components is from U.S. sources, the construction material is domestic, if not, it is nondomestic.	Contractor determines comparable delivered prices to the construction site of the domestic & nondomestic construction materials that in competition. If the domestic price is no more than 6% higher than the nondomestic price, the domestic construction material must be selected (subject to statutory waivers such as inconsistency with public interest & unavailability of domestic sources).
UNMANUFACTURED CONSTRUCTION MATERIALS	**UNMANUFACTURED CONSTRUCTION MATERIALS**	**UNMANUFACTURED CONSTRUCTION MATERIALS**
Unmanufactured construction materials to be delivered to construction site (usually mined or grown; e.g., gravel, are normally self-evident.	Source of unmanufactured construction materials identifies it as domestic or nondomestic.	Same procedure as for manufactured. Above.
	PROPOSED STATEMENT ON MATERIALS	**PROPOSED STATEMENT ON MATERIALS**
	Manufacturer or supplier of construction material to provide contractor with statement that material is domestic or nondomestic, based on cost of components.	Prime contractor to provide statement that prices of nondomestic construction materials selected are more than 6% less than quoted prices of domestic equipment or major materials. Maker of statement must keep price records so as to be prepared to justify selection of nondomestic materials upon request

APPENDIX A

PROPOSED REQUIRED STATEMENTS OF MANUFACTURERS OR SUPPLIERS, AND PRIME CONTRACTORS IN REFERENCE TO THE BUY AMERICAN PROVISION

A. Statement on Component Contents of a Construction Material

EPA is concerned that in applying the Buy American provision of the Clean Water Act of 1977 and implementing regulations, the prime contractor may not know when it is involved in dealing with a non-domestic construction material so that it can apply the up to 6 percent price preference for domestic construction materials.

To assist the prime contractor for construction in applying Buy American, a method is needed to inform the contractor when non-domestic materials are involved. No problem is anticipated with unmanufactured materials or foreign manufactured materials that are identified as foreign in invoices or by markings on the material. However, difficulties can occur when a domestic manufacturer provides materials that have a 50 percent or more foreign content, but there is no labeling or other information as to foreign content.

To remedy this problem, EPA is considering that a statement be required from the manufacturers or suppliers of major equipment or major materials, such as pipe, structural steel, or bulk materials, as listed in the specifications. The statement would read that the aggregate cost of the components, as determined according to the 50 percent method described in the PRM amounts to a construction material that is domestic or nondomestic. A sample is as follows:

> "The value of the components comprising the construction material identified as _____in contract number _____ for the sewage treatment project for the municipality of _____is (or is not) over 50 percent from United States sources and is therefore domestic (or not domestic) as described in EPA PRM dated _____.

Manufacturers or suppliers that state that their product is domestic must be prepared to substantiate these claims during future audits or protest actions.

Comments are invited as to whether EPA should require such a statement to accompany every bid or price quotation of every major equipment or main materials item, or only upon request when a protest occurs.

B. Statement of Contractor on Nondomestic Construction Materials

To facilitate the application of the Buy American provision, EPA is considering requiring that when nondomestic materials are chosen, the prime contractor must provide the grantee with a statement that (1) all material to be furnished is domestic, except for that shown on an attached list displaying major nondomestic equipment or materials chosen, for which the quoted delivered price of the nearest competitive domestic equipment (if received) was more than 6 percent over the quoted delivered price of the nondomestic equipment, or (2) the equivalent domestic material is unavailable. The contractor will maintain records to document the price differentials, for possible audit verification of its compliance or for other purposes. The statement itself will not require the listing of prices.

Comments are invited on this provision which is substantially required by at least one other Federal agency for direct government procurement.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 24 1980

THE ADMINISTRATOR

Construction Grants
Program Requirements Memorandum
PRM No. 80-6

SUBJECT: Retroactive Application of Program Requirements

TO: Regional Administrators

PURPOSE

The purpose of this memorandum is to reaffirm and explain statements made on behalf of the Agency regarding retroactive application of program requirements. This PRM will serve as the primary Agency policy statement concerning this issue.

DISCUSSION

A stable and efficient construction grants program is necessary for timely progress toward meeting the pollution control goals of the Clean Water Act. At the same time, Federal, State and local interests all require a high level of quality in facility planning, design and construction, and, at times, this may require retroactive application of requirements. A requirement has retroactive application when it affects a wastewater treatment project that has received one or more Step 1, 2 or 3 grants.

Some program delay and disruption is properly attributed to retroactive requirements. We share the concern others express over these impacts.

POLICY

The policy stated on past occasions which I now reaffirm is as follows:

> No new program requirements will be applied to projects having Step 3 grant assistance where construction is already underway or likely to be underway within six months of the grant award. EPA will avoid applying new requirements retroactively to projects in Step 1 or Step 2 funding unless they are essential to implement new laws or to correct serious deficiencies in the program.

While this statement states our basic policy, several additional elements must be addressed to complete the Agency position.

First, this policy is meant to deal with retroactivity in its negative aspects, and does not prohibit the imposition of new requirements at any stage of the grant process when EPA concludes it will have no effect on the timely completion of the project. Also, the Agency will continue to make certain new procedures available for optional use on a retroactive basis (e.g., when the grantee determines its best interests are served by use of the new procedure).

Second, there are two clear cases where new requirements must take precedence over this policy: (1) when they are essential to the implementation of new laws or presidential directives, or (2) to correct serious program deficiencies. Examples of serious program deficiencies are: questions of public health or safety hazard, or the potential for substantial net cost savings in planning, design, construction, fiscal management, or operation and maintenance in ongoing projects.

Third, I realize that EPA cannot anticipate all the varying circumstances under which this policy may restrict necessary and legitimate actions. It is fair to assume that there may be particular instances where this policy will hurt rather than help the progress of the program toward meeting the goals of the Clean Water Act. For these reasons I reserve the right to deviate from this policy in individual cases under rigorous standards for justification. That is, before taking any such action EPA will assess the impacts of that action, and notify affected interest groups in writing of our intentions, setting forth the results of the assessment and the specific reasons why we feel this action must be taken. If any such requirements are then issued, they must be signed by me, the Deputy Administrator, or the Assistant Administrator for the Office of Water and Waste Management.

I expect the Agency to follow both the letter and spirit of this policy. In particular, documents circulated in draft form (i.e., which are not interim or final) will not be applied to construction grant projects.

IMPLEMENTATION

EPA Headquarters and Regional Offices will implement this policy for all requirements affecting the construction grants program.

Douglas M. Costle

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 2 8 1980

OFFICE OF WATER
AND WASTE MANAGEMENT

Construction Grants
Program Requirements
Memorandum
PRM No. 80-7
Effective Date -
October 1, 1980

SUBJECT: Grant Eligibility of Minority Business Enterprise and Women's Business Enterprise Liaison Services

FROM: Henry Longest, Deputy Assistant Administrator
for Water Program Operations (WH-546)

Robert J. Knox, Acting Director
Office of Civil Rights (A-105)

TO: Regional Administrators, Regions I - X
ATTN: Water Division Directors
Office of Civil Rights Directors

I. PURPOSE

The purpose of this memorandum is to define and set forth guidelines for determining the grant eligibility of Minority Business Enterprise (MBE) and Women's Business Enterprise (WBE) liaison services performed during the process of planning, designing and constructing a wastewater treatment facility with Environmental Protection Agency (EPA) construction grant funds.

II. DISCUSSION

The Agency recognizes the need to immediately remedy the under-utilization of MBEs and WBEs in the Construction Grants Program. In order to provide the opportunity for increased MBE and WBE participation, EPA has determined that a goal oriented system of MBE and WBE participation must be a clear-cut factor in the evaluation of procurements, bids or proposals, as well as a condition for a grant award. One method of affording the opportunity for increased MBE and WBE participation is for grantees to establish or utilize MBE and WBE liaison services. The costs to the grantees for such services are eligible for EPA grant funding.

Such services will assist applicants/grantees to effectively implement the goal-oriented EPA "Policy for Increased Use of Minority Consultants and Construction Contractors", 43 Federal Register 60221 (December 26, 1978), and the "Women's Business Enterprise Policy for the Construction Grants Program," 45 Federal Register 51490 (August 1, 1980). See also, 40 C.F.R. 35.936-7, 40 C.F.R.§35.937-12 (b)(2), Appendix C-1 (para. 14), and Appendix C-2 (para. 9). These policies require grantees, consultants and contractors to take affirmative steps to utilize minority-and women-owned businesses in providing engineering and construction services and supplies.

Grantees may formally provide for such services by selecting:

1. An MBE/WBE liaison officer from internal staff (Additional staff may supplement internal staff only if required by project size) or

2. A contractor to perform such services (Contract services may be provided by either an MBE or WBE specialist or by a capable consulting firm).

The MBE/WBE liaison officer/service would be responsible for developing, implementing and managing the grantees MBE and WBE programs as they relate to the specific EPA funded project. Responsibilities include, but are not limited to: keeping records, providing technical assistance to MBEs, disseminating information on available business opportunities related to EPA grant projects to ensure that MBEs are provided an equal opportunity to participate in EPA's Construction Grants Program.

In order to effectively carry out the aforementioned responsibilities, the MBE/WBE liaison officer/service selected should be:

a. Familiar with and capable of interpreting and communicating the grantee's procurement procedures and requirements as well as EPA's MBE/WBE policies,

b. Understanding of small, minority, and women's business problems,

c. Capable of communicating effectively with women-minority-and majority-owned businesses and management,

d. Able to maintain a good rapport with the minority community,

f. Familiar with Federal, State and local resources available to aid MBEs, WBEs and small business, and

e. Able to maintain a good rapport with the women's business and community organizations.

III. POLICY

This PRM confirms EPA's policy that costs incurred by the performance of appropriate and necessary MBE/WBE liaison services, either by grantee staff or by contractor, which are directly related to a particular EPA funded construction project, are eligible for EPA grant participation.

IV. IMPLEMENTATION

Only necessary liaison services rendered in direct connection with an EPA Construction Grants Project by the MBE/WBE liaison officer/ service are grant eligible costs. While the provision of MBE and WBE liaison services is an eligible cost, it must be borne in mind that EPA will participate in the costs for hiring additional staff only in municipalities having ongoing and continuous EPA construction grants projects, large enough to support the need for such staff. Contracts for MBE/WBE liaison services which depart from conventional industry practices and which constitute a commercially unnecessary intermediate step between a grantee, liaison officer, consultant or contractor shall be considered ineligible.

Measures to achieve MBE and WBE program requirements should be submitted as part of the Step 1, Step 2, Step 3, and Step 2+3 grant applications. State agencies and potential grantees should be encouraged during the pre-plan-of-study conferences to integrate planning for use of MBEs and WBEs into each phase of the construction grant process and to achieve designated goals. This enables the Agency to judge before awarding financial assistance whether EPA funds are likely to be used to achieve the objective of increasing MBE and WBE participation.

The grantee must maintain complete records of MBE/WBE liaison services. Such records must include:

a. A brief narrative summary of activities conducted.

b. Certified time and attendance records clearly establishing relationship to EPA's MBE and WBE programs.

c. Bills/vouchers covering travel and other expenditures incurred in fulfilling the grantee's responsibilities under the MBE and WBE policies.

d. Documentation sufficient to constitute an audit trail of all costs charged to a specific project.

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